

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Charles A. Hurst,

Petitioner,

vs.

City of Duluth,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATIONS**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on Friday, July 10, 1998, at the Office of Administrative Hearings, Room 714, Government Services Center Building, 320 West Second Street, Duluth, Minnesota. The administrative record closed when the hearing ended.

The Petitioner, Charles A. Hurst, 5261 North Tischer Road, Duluth, Minnesota 55804, was not represented by an attorney and appeared at the hearing on his own behalf. Bryan F. Brown, Assistant City Attorney, 410 City Hall, Duluth, Minnesota 55802, appeared at the hearing as attorney for the Respondent, the City of Duluth.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,¹ the Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument to him. Parties should contact the office of Bernie Melter,

¹ Minnesota Statutes, section 14.61 (1996). (Unless otherwise specified, citations to Minnesota Statutes refer to the 1996 edition.)

Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, to find out how to file exceptions or present argument.

STATEMENT OF ISSUES

The City's Police Department raised issues about Officer Hurst's performance as a member of its Special Investigations Unit and then transferred him to a patrol group. After the transfer, he stopped receiving a pay increase he had been receiving for serving in the Special Investigations Unit. For purposes of the Veterans Preference Act, was his transfer to a patrol group the functional equivalent of removing him from a job?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Officer Hurst lives at 5261 North Tischer Road, Duluth, Minnesota 55804. He served on active duty in the United States Navy from March 16, 1965, until February 24, 1969, after which he was honorably discharged.²

2. The City of Duluth is located in St. Louis County, Minnesota, and is a political subdivision of the state and a city of the first class.³ The City's personnel practices are governed by a municipal merit system and by a Civil Service Code established by City ordinance.⁴

3. The City's merit personnel system establishes only three job classifications in the classified service within the City's Police Department — namely, police officer (job class no. 4402), police sergeant (job class no. 1712), and secretary, police department (job class no. 1707).⁵ There are no separate, civil service job classes for police officers assigned to perform peace officer duties in the Department's various internal work units.⁶

² DD Form 214 attached to Petition for Relief.

³ Minnesota Statutes, section 410.01.

⁴ Exhibit C.

⁵ Testimony of Jan Anderson; Exhibit 1, p. 11 and Exhibit E, p. 7.

⁶ Testimony of Jan Anderson.

4. In about 1974 the City employed Charles Hurst as a classified employee in the job class of police officer.⁷ Officer Hurst has continued his employment with the City in the same job class until the present.⁸

5. One of the Department's internal work units is its Special Investigations Unit. Dennin Bauers, who heads that Unit, is a police sergeant. He serves in the same job class and receives the same pay as police sergeants who serve in the Department's uniformed patrol divisions.⁹ All other members of the Special Investigations Unit serve in the "police officer" job class, as do all classified officers in the uniformed patrol divisions who are not sergeants.¹⁰

6. Under the collective bargaining agreement between the City and the Police Union that was in effect during the times important to this proceeding ("bargaining agreement"), the pay range assigned to the job class of police officer is Pay Range No. 326, which consists of three steps: Newly hired entry level police officers are paid at the basic monthly rate of Step A, which is currently \$2,331. After 12 months of service, police officers are paid at the basic monthly rate of Step C, which is currently \$2,710. After 24 months of service, peace officers in the job class of police officer are paid at the basic monthly rate of Step E, which is currently \$3,087.¹¹ Under the bargaining agreement, the pay range assigned to the job class of police sergeant is Pay Range No. 328, which also consists of three steps — namely, Steps C, D, and E.¹² The contract specifies certain times at which the pay of police sergeants progresses from Step C to Step D and from Step D to Step E.¹³

7. In addition to a police officer's basic monthly pay, the bargaining agreement calls for paying police officers certain kinds of premium or add-on pay when they are working in particular work units, special assignments, and work shifts.¹⁴ One kind of additional pay is called "investigator pay" which is available to

an employee in the classification of Police Officer who is assigned by written order of the Chief, to perform peace officer duties in the Traffic Bureau, S.C.A.N. office, Special Investigations Unit, I.D. Bureau, Auto Theft-Burglary-Arson Unit, Juvenile Bureau, License office, Training and Development Unit, Record Bureau, Detective

⁷ Exhibit 1, p. 15.

⁸ Id.; testimony of Officer Hurst.

⁹ Testimony of Sergeant Bauers.

¹⁰ Id.; testimony of Jan Anderson.

¹¹ Exhibit 1, p.11; Exhibit E, pp. 3 and 8.

¹² Id.

¹³ Id.

¹⁴ Exhibit E, articles 8.7, 8.8, 8.9, and 8.10.

Bureau, D.A.R.E., Crimestoppers, community relations, street crimes or school patrol . . .¹⁵ [Emphasis supplied.]

The bargaining agreement goes on to describe how much investigator pay police officers serving in those assignments will receive — that is, “a rate of pay which is the midpoint between the rate of pay range 326E and 328E.”¹⁶ During the times that are important to this proceeding, the monthly rate of investigator pay was \$3,230, or \$143 more than the basic monthly pay of a police officer not assigned to one of the special units or duties described in article 8.10 of the bargaining agreement.¹⁷

8. The Department’s uniformed patrol officers are divided into four Patrol Groups that staff two 12-hour shifts each day — a 7:00 a.m. to 7:00 p.m. shift and a 7:00 p.m. to 7:00 a.m. shift. Generally speaking, the members of each Patrol Group work a 12-hour shift for four days and then have four days off. Occasionally, patrol officers must work on holidays.¹⁸ On the other hand, members of the Special Investigations Unit generally work 8 to 10 hours a day for 4 to 5 days a week. They normally do not work on holidays and weekends.¹⁹

9. A majority of police officers employed by the Department consider patrol duty more desirable than serving in the Special Investigations Unit because when they are on patrol duty, they routinely have a four-day workweek, followed by four successive days off. Because of this, the City has encountered difficulties in getting police officers to apply for assignment to the Special Investigation Unit. One of the City’s objectives in establishing investigative pay for members of the Special Investigations Unit was to create an incentive for police officers to apply for assignment to that work unit.²⁰

10. In about 1989 and at his request, Officer Hurst was temporarily transferred by written order off the Chief of Police to serve as a police officer in the Department’s Special Investigations Unit.²¹ Beginning in September of 1997, Sergeant Bauers became Officer Hurst’s supervisor in that unit. While serving in that unit, Officer Hurst received the investigator pay described by the bargaining agreement. When various compensation provisions of the bargaining agreement are taken into account, Officer Hurst’s basic annual earnings as a member of the

¹⁵ Exhibit E, article 8.10.

¹⁶ Id.

¹⁷ Exhibit E, p. 8.

¹⁸ Testimony of Sergeant Bauers.

¹⁹ Id.

²⁰ Testimony of Sergeant Bauers.

²¹ Exhibit 1, p. 15.

Special Investigations Unit were \$3,529 more than his basic annual earnings would have been as a uniformed patrol officer.²²

11. On November 17 and 21-22, 1997, while serving as a member of the Special Investigations Unit, Officer Hurst was involved in two incidents that his superiors believed reflected performance problems on his part.²³ On November 24, 1997, Officer Hurst met with Sergeant Bauers and Deputy Chief Larson. During that meeting Deputy Chief Larson gave Officer Hurst a verbal reprimand that was reduced to writing.²⁴ Deputy Chief Larson also stated that he had considered transferring Officer Hurst out of the Special Investigations Unit immediately but that he had decided not to do so, in part because Sergeant Bauers had asked him to allow Officer Hurst to remain in the unit.²⁵

12. Two days after that meeting — on the evening of November 26, 1997, Officer Hurst was involved in yet a third incident that his superiors believed reflected a performance problem.²⁶ As a result of that third incident, Officer Hurst had another meeting with Sergeant Bauers and Deputy Chief Larson on December 15, 1997.²⁷ Officer Hurst understood during the second meeting that he might be disciplined again for the third incident and that the Department might also transfer him from the Special Investigations Unit to a patrol unit.²⁸ Officer Hurst first asked Deputy Chief Larson whether he could remain in the Special Investigations Units until he retired in about a year and a half, but Deputy Chief Larson told him that was not an option.²⁹ Thereafter, Officer Hurst acquiesced to a transfer to a patrol group.³⁰ Because of Officer Hurst's acquiescence to that kind of transfer, Deputy Chief Larson decided not to discipline him further.³¹

13. Under Article 5 of the bargaining agreement,

[t]he Employer and Union recognize and agree that except as expressly modified in this Agreement, the Employer has and retains all rights and authority necessary for it to direct and administer the affairs of the Police Department and to meet its obligations under federal, state and local law, such rights to include, but not be limited

²² Testimony of Officer Hurst; Exhibit G.

²³ Testimony of Officer Hurst and Sergeant Bauers; Exhibit 1, p. 19A.

²⁴ Exhibit 1, p. 15.

²⁵ Id.; testimony of Officer Hurst and Deputy Chief Larson.

²⁶ Exhibit 1, p. 14.

²⁷ Id.; testimony of Officer Hurst, Sergeant Bauers, and Deputy Chief Larson.

²⁸ Testimony of Officer Hurst.

²⁹ Id.

³⁰ Testimony of Officer Hurst and Deputy Chief Larson.

³¹ Testimony of Deputy Chief Larson.

to, the right to direct the working forces; to plan, direct and control all operations of the Police Department; to determine the methods, means, organization and number of personnel by which such operation and services are to be conducted; to assign and transfer employees; to schedule working hours and to assign overtime; to make and enforce reasonable rules and regulations; and to change or eliminate existing methods of operation, equipment or facilities.³² [Emphasis supplied.]

14. Other provisions of the bargaining agreement address the subject of demotions:

33.1 An employee may request or the Chief may propose the demotion of an employee in writing and shall furnish the employee with a copy of such recommendation stating the cause for such demotion. This recommendation shall give the future date on which the proposed demotion is to become effective, the class to which it is proposed to demote the employee, the new rate of pay, and any other information required. Also, the recommendation shall advise the employee that he or she may, within five (5) working days, file a written answer to the Board.

33.2 The Board may, upon its own initiative, and shall, upon the request of the employee concerned within ten (10) days hear the employee and determine whether the proposed demotion is justified and for the good of the City service. After such hearing and investigation or upon the expiration of five (5) days, if no communication is received from the employee, the Board shall forthwith approve or disapprove the recommendation of the Chief and so notify the Chief and the employee.³³

15. The City's Civil Service Code also contains the following provisions about demotions:

Sec. 13-87. Transfers within classified service—when deemed promotion; conditions for promotion.

Any permanent transfer of an employee involving a position in one class to a position in another class for which a higher maximum rate of compensation is prescribed shall be considered a promotion and shall be made only as the result of tests and certification from a promotional list, except as specifically provided otherwise (a) in this chapter, (b) by class specifications, or (c) by any provision of a collective bargaining agreement to which the City

³² Exhibit 1, p. 7.

³³ Exhibit 1, p. 8.

is a party, if such provision has been approved by the board.
[Citations omitted.]

Sec. 13-88 Same—when deemed demotion.

Any transfer of an employee involving a change from a position in one class to a position in another class for which a lower maximum rate of compensation is prescribed, whether such transfer does or does not involve an immediate reduction in pay, shall be called a demotion, and may be made upon the recommendation of the appointing authority with the approval of the board after the employee to be demoted has had an opportunity to be heard. [Citations omitted.]

16. On January 9, 1998, Deputy Chief Larson issued Department Personnel Order #98-4, which temporarily transferred Officer Hurst from the Special Investigations Unit to Uniformed Division Group A effective on Monday, January 12, 1998.³⁴

17. At no time before, during, or after Deputy Chief Larson issued Personnel Order #98-4 did the City provide Officer Hurst with notice of a Veterans Preference Act right to request a hearing on whether there was cause for a demotion.

18. On January 23, 1998, the Duluth Police Union, acting on Officer Hurst's behalf, filed a grievance under the bargaining agreement seeking restoration of any pay and benefits that Officer Hurst may have lost as a result of his transfer from the Special Investigations Unit to Uniformed Division Group A. The basis for the grievance was that the transfer represented a demotion.³⁵ That grievance is still pending.³⁶

19. On May 11, 1998, Officer Hurst filed a petition with the Commissioner of Veterans Affairs requesting relief from the City's actions. On June 5, 1998, the Commissioner served a Notice of Petition and Order for Hearing on the parties, and this proceeding began.

20. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

21. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

³⁴ Exhibit I.

³⁵ Exhibit 1, p. 4.

³⁶ Testimony of Officer Hurst.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law³⁷ gives the Commissioner of Veterans Affairs and the Administrative Law Judge authority to consider the Veterans Preference Act³⁸ issues that have been raised in this contested case proceeding.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all of the law's substantive and procedural requirements.

3. The Department gave the City proper and timely notice of the hearing in this matter.

4. Officer Hurst is an honorably discharged veteran within the meaning of the Minnesota Veterans Preference Act,³⁹ and he is entitled to all of the protections and benefits of that Act.

5. The City is a political subdivision of the state within the meaning of the Veterans Preference Act⁴⁰ and its personnel practices are therefore subject to the provisions of that Act.

6. Minnesota law⁴¹ requires a public employer to give a veteran notice of the right to a hearing to establish incompetency or misconduct prior to any action to remove the veteran from his or her job.

7. Failing to give a veteran notice of a right to a hearing when demoting him violates the Veterans Preference Act if the demotion "is the functional equivalent of removal from a job."⁴²

8. The City has never notified Officer Hurst of his right to have a hearing to establish incompetence or misconduct nor of any other right under the Veteran's Preference Act.

³⁷ Minnesota Statutes, section 14.50 and section 197.

³⁸ Minnesota Statutes, section 197.46.

³⁹ Minnesota Statutes, section 197.447, and section 197.46.

⁴⁰ Minnesota Statutes, section 197.46.

⁴¹ Id.

⁴² Smith v. City of Champlin, No. C8-97-2118 (Minn. App. July 21, 1998).

9. Officer Hurst's transfer from the Department's Special Investigations Unit to a uniformed patrol unit was not a demotion that was the functional equivalent of removal from a job, and the City therefore did not violate the Veterans Preference Act by failing to give him notice of a right to a hearing on whether there was cause to justify his reassignment.

10. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

11. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATIONS

The Administrative Law Judge therefore recommends that the Commissioner DISMISS the Petition of Charles A. Hurst.

Dated this _____ day of August, _____ 1998.

BRUCE H. JOHNSON
Assistant Chief Administrative Law
Judge

Reported: Tape Recorded (three tapes); No Transcript Prepared.

NOTICE

Under Minnesota law,⁴³ the Commissioner of Veterans Affairs is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.

⁴³ Minnesota Statutes, section 14.62, subdivision 1.

MEMORANDUM

Minnesota law⁴⁴ permits an honorably discharged veteran, who believes that a public employer has violated his rights under the Veterans Preference Act, to petition the Commissioner of Veterans Affairs for relief. Under the law,⁴⁵ the Commissioner then starts a contested case proceeding before an administrative law judge. After hearing the evidence and the legal arguments made by the parties, the administrative law judge is then required to submit a report to the Commissioner, consisting of findings of fact, legal conclusions, and recommendations about what action the Commissioner should take.⁴⁶ After receiving Officer Hurst's petition for relief, the Commissioner began this contested case proceeding by issuing a Notice of Petition and Order for Hearing on June 5, 1998. The Notice scheduled the hearing in this matter for 9:30 a.m. on July 10, 1998, at the Office of Administrative Hearings in Duluth, Minnesota.

In his Petition, Officer Hurst claims that the Duluth Police Department demoted him by transferring him from its Special Investigations Unit to a uniformed patrol unit — a transfer that resulted in a loss of pay. He further contends that this alleged demotion violated the Veterans Preference Act because the City failed to notify him of a right to a hearing on whether there was cause for his demotion. For its part, the City concedes that it did not notify Officer Hurst of any veterans preference rights, but it claims it was not required to give him that notice for two reasons. First, the City contends that the transfer was simply a reassignment of Officer Hurst's duties as a police officer and not a demotion. Second, the City alleges that it was Officer Hurst himself who requested the transfer. So even if the transfer is considered a demotion, it should be considered a voluntary one.

Under Minnesota law,⁴⁷

[n]o person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. [Emphasis supplied.]

⁴⁴ Minnesota Statutes, section 197.481.

⁴⁵ Minnesota Statutes, sections 14.57 through 14.62 and section 197.481, subdivision 4.

⁴⁶ Minnesota Statutes, section 14.50.

⁴⁷ Id.

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.

In a case such as this, Minnesota law first requires Officer Hurst to establish a prima facie case — that is, to show that under normal circumstances he would be entitled to his veterans preference rights and that those rights were apparently violated. The parties both agree that Officer Hurst is an honorably discharged veteran who is entitled to the protections of the Veterans Preference Act whenever they are available. They also do not dispute that Officer Hurst's basic monthly pay was reduced when the Department transferred him to a patrol group on January 9, 1998. The evidence also clearly indicated that his transfer was related to what his superiors considered to be inadequate performance in the Special Investigations Unit. Finally, the parties agree that the City did not inform Officer Hurst that he had a right to a hearing at which the City was required to show incompetence or misconduct on his part before reassigning him to a patrol group. In short, Officer Hurst did establish a prima facie case that the City violated rights afforded him under the Minnesota Veteran's Preference Act.

The City's argument that this reassignment does not amount to a demotion relies heavily on the fact that both the bargaining agreement and the City's Civil Service Code define demotion as a transfer from one job class to another job class, along with a reduction in base pay. It contends that since Officer Hurst's job class — i.e., police officer — did not change, no demotion occurred here. While the absence of any change in job class might conclusively establish that Officer Hurst was not demoted for purposes of the bargaining agreement or the Civil Service Code, it does not necessarily establish that no demotion occurred for purposes of the Veterans Preference Act. Minnesota's appellate courts have repeatedly emphasized that in determining whether a public employer violated that Act, a reviewing tribunal must look at the underlying substance, and not just the apparent legal form, of the personnel transactions in question.⁴⁸

Here, Officer Hurst argues that the substance of what happened to him conclusively establishes that the Department demoted him. He points to the fact that the Department changed his duties, that the change was disciplinary in nature, and that it was accompanied by a reduction in his base pay. This, he contends, amounts to a demotion for purposes of the Veterans Preference Act regardless of what the Department may have chosen to call it and regardless of what its legal effect may be under the bargaining agreement and the City Civil Service Code.

⁴⁸ See, for example, Gorecki v. Ramsey County, 437 N.W.2d 646, 650 (Minn. 1989) and Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987).

But the facts cited by Officer Hurst do not represent the entire underlying substance of what happened here. There are some other facts suggesting that what occurred was merely a reassignment of duties rather than a change in job. The evidence established that a majority of the City's police officers considered service in the Special Investigations Unit to be a less desirable assignment than service in a uniformed patrol group where the work schedule consistently gave them four successive days off. More to the point, the evidence established that one of the reasons why the City established a premium to be added to the pay of police officers serving in the Special Investigation Unit was to compensate for its less desirable work schedule and create an incentive for patrol officers to apply to be assigned there. Put another way, before the City created investigator pay for members of its Special Investigations Unit, assignment there was subjectively regarded as a demotion by most City police officers, and the goal of premium pay was to restore a sense of relative equivalence between patrol duty and investigator duty.

In determining whether a demotion has occurred for purposes of the Veterans Preference Act, the Minnesota Supreme Court has also indicated that one must look at the extent to which a veteran's job duties and responsibilities are affected by the change.⁴⁹ Here, Officer Hurst's fundamental duties and responsibilities as a police officer, as defined by the City's description of that position,⁵⁰ remain unchanged by the transfer. All that has really changed for him is that he now wears a uniform rather than plain clothes and that he works four successive days of 12-hour shifts rather than 8 hours a day, Monday through Friday. Those are not material changes in his job. Looking at the same issues somewhat differently, the Minnesota Court of Appeals has held that not all employment changes that might be characterized as demotions trigger rights under the Veterans Preference Act. Only demotions that are "the functional equivalent of removal from a job" bring those rights into play.⁵¹ For example, in Gorecki, *supra*, the Minnesota Supreme Court concluded that reclassifying veterans into a new job class with a lower salary range did not necessarily trigger rights under the Veterans Preference Act even though it might be characterized as a demotion. Here, transferring Officer Hurst to a uniformed patrol unit was not the functional equivalent of removing him from his job as a police officer.

Additionally, the Minnesota Supreme Court has emphasized that the purpose of the Veterans Preference Act is to protect veterans from being removed from their jobs through exercises of arbitrary power but that "the act cannot be viewed as fully restricting the government's exercise or control over its administrative affairs."⁵² The City's Chief of Police is responsible for maintaining

⁴⁹ Gorecki, *supra*, 437 N.W.2d at 650.

⁵⁰ Exhibit 1, pp. 13A-13C; Exhibit D.

⁵¹ Smith v. City of Champlin, *supra*.

⁵² Gorecki, *supra*, 437 N.W.2d at 650.

public safety within that community. He presumably was appointed to that position because the Mayor and City Council had confidence in his ability to manage the affairs of the Department in ways that accomplished that goal. Absent some compelling evidence that the Chief has agreed to limit his discretion to determine which of the Department's police officers are best suited for particular assignments, the Veterans Preference Act should not be interpreted as limiting that administrative discretion.

Finally, having concluded that Officer Hurst's transfer to a patrol group was not a demotion within the meaning of the Veterans Preference Act, it is unnecessary for the Administrative Law Judge to determine whether the transfer was at his own request or was unilaterally ordered by Deputy Chief Larson.

B. H. J.